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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-.....

BIRDIE MAE DAVIS, EDWIN FOSTER and JAMES E. BUSKEY, et al.,
Petitioners,

vs.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, et al.,
Respondents.

ALFREDO G. PARRISH, et al.,
Petitioners,

vs.

BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

## BRIEF FOR RESPONDENTS BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR ET AL. IN OPPOSITION

Respondents will reply only to that portion of the petition for certiorari which has reference to *Parrish v. Board of Commissioners.*

## OPINIONS BELOW

The petition for certiorari has attached as an appendix to the petition the opinions of the courts below. See page 36a, et seq., of the Appendix to the petition for certiorari for the opinion of the Court of Appeals en banc from which petitioners seek to have review in *Parrish v. Board of Commissioners*.

## QUESTIONS PRESENTED

In addition to the question presented by petitioners, there is a threshold question:

1. Is the petition for certiorari in *Parrish v. Board of Commissioners* inappropriate and in violation of Rule 20 of the Revised Rules of this Court in that it involves an effort to obtain review of an interlocutory order while this case is still pending in the Court of Appeals, the case having been remanded by the Court of Appeals en banc to the original panel in that Court which first heard the appeal from the district court?

2. Did the Court of Appeals properly hold that the federal district judge in *Parrish v. Board of Commissioners* was not required on the facts alleged in the affidavit to recuse himself?

## STATUTES AND RULES INVOLVED

Rule 20 of the Rules of the Supreme Court of the United States, which is as follows:

> "A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court,

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> will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court."

28 U.S.C. Sec. 144, and 28 U.S.C. Sec. 455 prior to its amendment in 1974 and said section as amended.

The statutes are set out in petitioners' brief.

## STATEMENT OF THE CASE

In *Parrish v. Board of Commissioners*, petitioners are seeking review of an order of the trial judge declining to recuse himself. The case was decided by the trial judge by an order granting summary judgment. The case was appealed to the Fifth Circuit. A three judge panel in that court decided the judge should have recused himself and remanded. Subsequently, the opinion was withdrawn on the Court's own motion, and the Court of Appeals en banc held that the action of the trial judge on the motion to recuse was proper, and remanded the case for further disposition to the original panel.

In the district court, when the trial court was advised that petitioners might wish to file a motion asking the judge to recuse himself, the trial judge invited counsel for petitioners to examine him with reference to such a motion. This examination of the judge developed the sole facts on which the affidavit seeking recusal was based. These facts are:

(1) The trial judge was acquainted with several of the defendant bar examiners. Some had been adversary counsel in prior litigation; some of them he knew slightly; and some, not at all. He knew the attorneys representing the defendants.

(2) The trial judge was a friend of a former Secretary of the Bar Commission who petitioners' counsel stated would be called as an adverse witness. In response to questions from

petitioners' counsel concerning whether Mr. Scott's being a witness would present any problems for the trial judge, the trial judge stated that he thought Mr. Scott was an honorable man. "But I don't think his memory is infallible. I think he would try to tell you the truth in his answers. But if he appeared to evade I think I could detect it."

(3) The judge was asked if there was conflicting testimony between a witness he did not know and "a defendant who you do know, slightly or otherwise, might there be any problem in your attaching more weight to the testimony of the person that you know rather than the person who you do not know." He said he did not believe he would have any bias or prejudice about the matter. He said of the people he did know he would "have no reason to think any of them would intentionally misrepresent anything." (Tr. 61)

(4) The trial judge was President of the Montgomery County Bar Association before becoming a federal judge. When serving as its president, he learned that the by-laws of that bar association barred Blacks from membership. He appointed a committee to study and recommend changes in the by-laws. Although he made no specific recommendations, the bar association on the recommendation of the committee did change the association's by-laws to remove any racial exclusion. The judge never extended an invitation to a Black lawyer to join the association, although he knew Black lawyers who were practicing in Montgomery County.[1]

---

[1] The Montgomery County Bar Association is a voluntary association which has no official status and is not an arm of the Alabama Bar Association. The Alabama Bar Association has been an integrated Bar Association with its membership open to all practicing attorneys within the State of Alabama at least since 1923. Its membership has included Black lawyers for several decades. Only the Alabama Bar Association acting as the arm of the Supreme Court of Alabama, has any role in the admission, discipline or removal of attorneys in Alabama. *Simpson v. Ala. State Bar Asso.*, 9 ABR 1120, — Ala. —, 311 So.2d 307; *Board of Commr's v. State ex rel. Baxley*, 10 ABR 239, Dec. 4, 1975.

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After months of exhaustive discovery pursued by petitioners, and when petitioners were unable to present any evidence to challenge the sworn affidavits from all of the defendant examiners and the Secretary of the Bar Association that all examinations were graded with complete anonymity as to the race and identity of the applicants,[2] the trial judge granted the respondents' motion for summary judgment.

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[2] The only evidence which had any claimed challenge to the affidavits of the bar examiners and Secretary of the Association came from the affidavits of two plaintiffs who said it "might be possible" for a bar examiner to determine the race or identity of an examinee.

## ARGUMENT

### Reasons for Denying the Writ

In the proceedings in the trial court, respondents took no position relative to the motion of petitioners for recusal of the judge. Respondents did not participate in any way in the interrogation of the judge. Respondents took the position in the trial court that the matter of recusal was one largely of judicial administration and that respondents had no interest in this case being considered by any particular judge. It was for this reason that respondents did not ask for reconsideration of the opinion of the original panel hearing the appeal that the trial judge should have recused himself, which opinion was vacated by the Court of Appeals en banc. The Court of Appeals reversed the three judge panel on its own motion.

Although respondents have no interest in this case being considered by any particular judge, respondents do have an interest in bringing to an end this litigation which has already consumed more than three years from the date of the filing of the complaint. Accordingly, respondents will respond to the petition for certiorari.

I

**To Review Interlocutory Order While Case Is Still Pending in Court of Appeals Is Inappropriate.**

The petition in *Parrish v. Board of Commissioners* seeks review by this Court of an interlocutory order of the Court of Appeals and it seeks such review while the case is still pending in the Court of Appeals.

This Court has repeatedly declined to review interlocutory orders. In *American Const. Co. v. Jacksonville T & T R. Co.*, 148 U.S. 372, 384, this Court stated:

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> "Clearly, therefore, this Court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

See also *Cobbledick v. U. S.*, 309 U.S. 323, 324; *Hamilton Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 258. Moreover, this Court's own rules prohibit review of cases pending in a court of appeals before judgment is given in such court, except "upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this Court." Rule 20, Supreme Court Practice. No such showing of imperative public importance is even claimed in the instant petition.

In the instant case, petitioners are not only seeking review of an interlocutory order, but they seek it while the case is still pending before a panel of the Court of Appeals. This case was remanded to such panel by the Court of Appeals en banc on December 4, 1975. One of the purposes of the rule against issuing a writ of certiorari of this Court to review interlocutory orders is to prevent piecemeal disposition of a single controversy, thereby avoiding "the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration need not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause." *Cobbledick v. U.S.*, 309 U.S. 323, 325.

The momentum in the instant case does not need any further retarding, since it has now been more than two years since the trial judge entered his order granting summary judgment. The effect of further review on the recusal issue would add more

months of delay on an issue which is in no way decisive. The issue still pending before the Court of Appeals is whether any genuine issue of fact exists which would require reversal of the summary judgment. If the Court of Appeals finds there is no such issue, the action of the trial judge on recusal is irrelevant.

II

**The Court of Appeals and Trial Judge Properly Resolved the Issue of Recusal.**

Petitioners contend that the trial judge should have recused himself because he was personally acquainted with a number of the defendants and their counsel, and he was not acquainted with the plaintiffs. The trial judge set out the basis of his acquaintance with respondents and their counsel. The relationship was largely based on the trial judge's years of trying law suits as adversaries with some of the respondents and their counsel and an acquaintance with them as lawyers. Petitioners cite not one case which remotely suggests that such an acquaintance is ground for recusal. Probably most district judges have an acquaintance with most of the trial lawyers practicing before them. A rule requiring recusal because of such acquaintance would be novel and burdensome to judicial administration.

Petitioners' petition at page 14 states that the trial judge "candidly conceded his belief that the key defense witness, the Secretary of the Commission, a close personal friend of the judge, would not lie." Only in this brief by petitioners is Mr. Scott called "a key defense witness." Even in the affidavit seeking the judge's recusal, Mr. Scott is only referred to as one whom the plaintiffs propose to call as an adverse witness. Mr. Scott is not the Secretary of the Commission as stated by petitioners. He has had no position with the Commission since his retirement as Secretary in May, 1969.

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There is no basis for the statement that Mr. Scott is "a close, personal friend" of the trial judge. The trial judge stated that Mr. Scott was a friend, that he had in years past tried one or two cases in which Mr. Scott was involved as co-counsel. The testimony with reference to Mr. Scott was as follows:

> Q. Judge, Mr. Scott will be one of the witnesses, either by deposition, or otherwise, in this case, and I did want to call that to your attention. There will be some documentary evidence which I am sure the defendants will discover, relating to a written communication by Mr. Scott—or we say by Mr. Scott—concerning black lawyers and their association. Do you think that your association with Mr. Scott would influence the weight to which you might attach to that type of evidence?
>
> A. I think Mr. Scott is an honorable man. But I don't think his memory is infallible. I think he would try to tell you the truth in his answers. But if he appeared to evade I think I could detect it.
>
> Q. Do you know what Mr. Scott's position is now?
>
> A. Oh, I think Mr. Scott has retired.
>
> Q. Well, did you all visit in each other's homes?
>
> A. We don't regularly. I don't recall ever having been in Mr. Scott's home. I know he hasn't been in my home. I am quite sure I have not visited Mr. Scott.

It is puzzling to know where in the statutes relied on by petitioners or in any case anywhere a trial judge is deemed disqualified because he is an acquaintance or a friend of a witness expected to be called to testify. Such acquaintance does not give "fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Berger v. U. S.*, 255 U.S. 2 (1921).

Petitioners suggested that the judge was biased in favor of the credibility of Mr. Scott and certain of the defendants because in response to a question he stated that he didn't believe such persons would intentionally misrepresent or perjure themselves. The opinion of the court below correctly characterized the trial judge's response to questions as to the credibility of such persons as "no more than an acknowledgement of friendship or acquaintanceship, and a refusal to condemn those persons as unworthy of belief in advance of whatever their testimony might prove to be." Every witness is entitled to a presumption that he speaks the truth. The fact that the trial judge acknowledged that he would accord this presumption to the witness Mr. Scott and to the defendants of his acquaintance is not ground for his recusal.

Petitioners also argue that the trial judge should have recused himself because he had been President of the Montgomery County Bar Association at a time when that Bar Association had a prohibition in its by-laws against the admission of Blacks to membership. The trial judge stated that after learning of the prohibition, he appointed a committee to study the Bar Association's by-laws and to make recommendations as to proposed changes. The committee appointed by the trial judge made a recommendation that the prohibition be removed and it was removed.

The opinion of the Court of Appeals points out that there is hardly any judge in the Fifth Circuit who was not a member of a segregated bar association at one time. The action of this trial judge in becoming president of a bar association which still had a prohibition against such minority membership and taking steps as president which resulted in the elimination of such discrimination hardly raises a reasonable inference of personal bias or prejudice by such trial judge as to these petitioners.

The Court of Appeals correctly held that the factual bases alleged for recusal did not raise an inference of personal bias or prejudice.

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Petitioners also claim that since the trial judge was a member of the Alabama Bar Association which is supported by license fees of its members, the trial judge has a financial interest in the litigation in that he would indirectly be liable for any court costs, counsel fees or damages which might be awarded. All lawyers who practice law in Alabama are compelled to be members of the Alabama Bar Association, which is an organization established by the Alabama Legislature, Title 46, Sec. 21, et seq., of the Alabama Code. If such a tenuous "financial interest" is ground for recusal, then a judge who is a taxpayer of a city or state should be forced to disqualify himself in cases where his city or state has a financial interest. Would a federal judge have a disqualifying "financial interest" in a suit against the United States which pays his salary? Obviously not. No reasonable basis exists for a belief that such membership by the trial judge in the Alabama Bar Association would cause him to have a financial interest in this litigation.

Finally, petitioners assert that the trial judge is being represented by one of the attorneys for the defendants in an unrelated matter, and that this circumstance requires the trial judge's recusal. Petitioners neglect to inform this Court that such representation did not occur until approximately two years after the trial judge ruled on the summary judgment motion and the instant case was appealed from his court. The Court of Appeals was reviewing, among other things, whether the trial judge erred in failing to recuse himself. It is novel to suggest that a circumstance occurring nearly two years after the appeal was taken from that trial judge's court is ground for reversal of his action in ruling on summary judgment.

If this case is ever remanded to the trial judge for further proceedings, it is reasonable to assume that the trial judge would consider any motion to recuse based on facts existent at that time. It is totally unreasonable to suggest that a trial judge be reversed because he failed to recuse himself when the grounds

of such recusal were not even existent at the time the case was appealed from such judge's court.

Respondents have not argued whether Sec. 455 as amended is applicable to the motion to recuse in this case. Respondents agree with the majority opinion of Judge Bell that whether the standard for considering the recusal motion is under Section 155 or the amended Section 455, the affidavit for recusal is insufficient. We also agree, however, with Judge Roney's concurring opinion that Section 455 as amended did not apply to this trial which was completed and summary judgment granted on August 21, 1973. Congress provided that the new Section 455 "shall not apply to the trial of any proceeding" commenced prior to December 5, 1974. As Judge Roney stated: "We are judging the correctness of that trial and should do so by the standard applying to it as clearly set forth in the statute."

**The Alleged Conflict Between Holdings of This Court and the Decision Below Is Non-Existent.**

Petitioners assert that a significant conflict exists between the Courts of Appeal in that some of them have followed the standard for recusal laid down in *Berger v. U. S.*, 255 U.S. 22, whereas other circuits and the opinion below are inconsistent with *Berger*. This alleged conflict would undoubtedly come as a surprise to the author of the majority opinion in this case which repeatedly relies on and quotes from *Berger*. For example, the opinion below quotes as follows from *Berger*:

> "The facts and reasons set out in the affidavit 'must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment.' Berger v. U.S., supra, 255 U.S. at 33."

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The majority opinion below also quotes, discusses and follows, *U. S. v. Thompson* (3 CA), 483 F.2d 527, which is listed in petitioners' brief as a case which follows *Berger*.

For the alleged conflict, petitioners' brief cites *Pfizer v. Lord* (CA 8), 456 F.2d 532. But the *Pfizer* opinion cites *Berger* and follows its teaching. The *Pfizer* opinion states: ". . . although the challenged judge may not pass upon the truth of the facts alleged in the affidavit, he may decide whether the facts alleged give fair support to the charge of bias or prejudice."

Petitioners' brief at page 18 refers to the concurring opinion of Judge Gee as attacking *Berger* as "an outdated rule." Petitioners do not tell this Court that Judge Gee's quarrel with the majority opinion was because it "reaffirms *Berger's* antique rule." It is difficult to understand how petitioners can claim that the opinion below is in conflict with *Berger* when it quotes and cites *Berger* as its authority and when Judge Gee's quarrel with the majority opinion is its reaffirmance of *Berger*.

The cases which have construed Section 144 turn primarily on the different fact situations alleged in the affidavits. But in none of the cases cited by petitioners or examined by respondents has the factual basis for removal set out in the affidavits been as weak as in the instant case, even though in most of the cases cited by petitioners the courts held the affidavits insufficient.

## CONCLUSION

This Court should not grant this petition for certiorari which would involve piecemeal review of an interlocutory order while this case is still pending before the Court of Appeals. The decision below was correct, and the affidavit alleging personal bias on the part of the trial judge was clearly insufficient to give fair support to the charge of personal bias.

Respectfully submitted

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**Certificate of Service**

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